Supreme Court, U.S.
FILED
FEB 2 - 2004
OFFICE OF THE CLERK

No. 03-944

# In The Supreme Court of the United States

AMERICAN GEM SEAFOODS, INC., and MCMI FOOD COMPANY, INC.,

*Petitioners,*

v.

WEI ZHANG,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION

SCOTT BLANKENSHIP*
THE BLANKENSHIP LAW FIRM, P.S.
1201 Third Avenue, 28th Floor
Seattle, WA 98101
(206) 343-2700

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

*Counsel for Respondent*
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

STATEMENT OF THE CASE ..... 1

A. Discrimination Against Zhang ..... 1

B. Zhang Suffered Significant Emotional Distress ..... 7

PROCEEDINGS IN THE DISTRICT COURT ..... 9

PROCEEDINGS IN THE APPELLATE COURT ..... 11

REASONS FOR DENYING THE WRIT ..... 11

I. Petitioners Did Not Adequately Present or Preserve in the Courts Below Their Challenge to the Constitutionality of the Punitive Damage Award ..... 11

II. This Case Does Not Present A Certworthy Issue Regarding The Amount of the Punitive Damage Award ..... 15

III. Petitioners Did Not Adequately Preserve In The District Court Any Objection To The Sufficiency of the Evidence Regarding Compensatory Damages ..... 17

IV. This Case Does Present Any Inter-Circuit Conflict Regarding The Type of Evidence Needed to Support An Award of Damages for Emotional Distress ..... 19

CONCLUSION ..... 22

# TABLE OF AUTHORITIES

Page

CASES:

*Ahern v. Scholz*, 85 F.3d 774 (1st Cir. 1996) ..... 19

*Belk v. City of Eldon*, 228 F.3d 872 (8th Cir. 2000)..... 19

*BMW of North America v. Gore*, 517 U.S. 559 (1996) .. 13, 15

*Bogle v. McClure*, 332 F.3d 1347 (11th Cir. 2003)..... 20

*Bristol Steel & Iron Works v. Bethlehem Steel Corp.*, 41 F.3d 182 (4th Cir. 1994)..... 19

*EEOC v. Bd. of Regents of the Univ. of Wis. Sys.*, 288 F.3d 296 (7th Cir. 2002)..... 19

*Hygh v. Jacobs*, 961 F.2d 359 (2nd Cir. 1992)..... 19

*Matthias v. Accor Econ. Lodging, Inc.*, 2003 U.S. App. LEXIS 21299 (7th Cir. 2003) ..... 16

*Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 199 (1991)..... 14

*Price v. City of Charlotte, North Carolina*, 93 F.3d 1241 (4th Cir. 1996)..... 21

*State Farm Mutual Automobile Insurance Co v. Campbell*, 123 S. Ct. 1513 (2003)..... 14, 15, 16

*United States v. Draper*, 762 F.2d 81 (10th Cir. 1985) ..... 19

*Whitehead v. Food Max, Inc.*, 163 F.3d 265 (5th Cir. 1998) ..... 19

*Wolff v. Allstate Life Ins. Co.*, 985 F.2d 1524 (11th Cir. 1993) ..... 19

TABLE OF AUTHORITIES – Continued

Page

RULES:

Fed. R. Civ. P. 50(b) ..... 11, 17, 19

Fed. R. Civ. P. 51 ..... 17, 18, 19

Fed. R. Civ. P. 59(a) ..... 18

Sup. Ct. Rule 10 ..... 16

## STATEMENT OF THE CASE

Petitioners' writ should be denied. Procedurally, there are many layers of waiver insulating the substantive issues from review, a fact that Appellants fail to even address. Substantively, petitioner's issues completely lack merit. Plaintiff, Mr. Wei Zhang ("Zhang") was an exemplary employee, devoted loyally and tirelessly to his employer. Despite his accolades, he had to endure discrimination from the moment his company was purchased by Defendants in 1997. Petitioners' behavior was reprehensible causing Zhang great anguish and shame while it occurred during his employment. He was still experiencing this shame and emotional distress two years after his termination at trial, August 2001.

### A. Discrimination Against Zhang

Zhang was formerly a dean and professor of business at Northeastern University in Dalian, China. He came to the United States due to the political crackdown following the Tiananmen Square massacre. After finishing his MBA at Delaware State University, he began working in the seafood industry. Petition for Writ of Certiorari Appendix ("Pet. App."), 2a; 339 F.3d at 1024.

Zhang became an executive at Sea-Rich Seafoods, acquired by American Gem Seafoods. Mr. Zhang quickly climbed the corporate ladder, and became one of the key executives in the company running a division called Pacific Gem. (Pet. App. 3a); 339 F.3d at 1025.

Zhang was an exemplary employee. Virtually everyone who worked with Zhang was impressed by his work ethic and dedication to the company. Zhang was an

extremely hard worker. Supp. ER ("S.ER") 45. He was the portal to China and generated approximately 30 percent of overall business. S.ER 44:2-22.

According to former American Gem President Mullin, Zhang worked harder than anyone else in the company. S.ER 83:17-84:5. Because his responsibility covered time zones from China to the east coast of the United States, Zhang often worked from 6:30 a.m. until midnight. S.ER 147:16-23. According to former American Gem President Reitzer, Zhang "was one of the most tireless, hard-working, sincere, loyal employees I've ever had working for me." S.ER 6:16-25. Another executive testified that Zhang's work was excellent, and that he was very dedicated to his job. S.ER 56:17-25.

Zhang had higher gross sales in 1998 (the last full year he worked before he was fired February 1999) than any other employee at American Gem. S.ER 209:13-213:16; 255:11-14. Zhang's division, Pacific Gem, was the only profitable division in the company.[1] Zhang saved the company from substantial losses by selling approximately 3500 metric tons of herring to end-users throughout China at a time when the market had collapsed. S.ER 88:1-93:6. According to Mullin, "[i]t's one of the most accomplished feats of anybody I know." S.ER 89:19-21.

Zhang's career took a turn for the worse, immediately after MCMI Food Company of San Antonio, Texas bought SeaRich Seafoods, in 1997 renaming it American Gem

[1] S.ER 15:8-10; 49:17-20; 85:8-22; 216:11-217:16; Ex. 51, S.ER 329; Ex. 77, S.ER 336-337.

Seafoods.[2] Zhang was immediately subjected to racial discrimination. From the start, the new ownership offered Zhang a lower salary than similarly situated Caucasian employees with similar titles and duties even though the division he ran was key to the acquisition.[3] He was kept out of important management meetings in which he had previously participated. His vendors were always the last to be paid. The discrimination escalated after the parent company later hired a new CEO, Harry Lees in December 1997.(Pet. App. 3a); 339 F.3d at 1025.

Lees made numerous discriminatory comments against Mr. Zhang, expressing distrust in Mr. Zhang because he was Chinese and Asian. Witnesses testified to these and other discriminatory comments at trial, including key testimony from former executives of American Gem. (Pet. App. 3a, 4a); 339 F.3d at 1025.

In November 1998, a new management team was hired. This new team began discriminating against Zhang by sidelining him, changing his reporting structure, excluding him from meetings, demoting him, and reducing his responsibilities and title. He had previously been in charge of all Asia operations, but his new business card reflected a reduction of his responsibilities to only China. (Pet. App. 3a); 339 F.3d at 1025. Eventually, they

---

[2] Shortly before trial, the assets of American Gem were sold, but the liabilities were not. At the time of trial, American Gem was just a shell corporation, "all paper and no function." The assets were sold to WorldCatch for $4 million, whose CEO is Jim Hilger, former president and CFO of American Gem. S.ER 121:7-126:18; 127:23-25; S.ER 127:16-586:7; S.ER 129:9-588:12.

[3] S.ER 5:3-19; 7:1-21;11:22-14:1.

appointed a less qualified Caucasian executive to take over Zhang's duties and position.[4]

Zhang was also denied a $25,000 bonus he was entitled to under his contract for 1998. Petitioners' justification for this denial was that although the Pacific Gem division was profitable, American Gem, as a whole, was not. Zhang's Caucasian replacement Jim Bugbee, however, received a bonus for 1999 even though American Gem was not profitable that year either. (Pet. App. 5a); 339 F.3d at 1025.

American Gem omitted Zhang from industry publications that listed vice presidents and managers of American Gem. His Caucasian replacement, Bugbee, was listed as having Zhang's title, Vice President of Asian Procurement. The publication stated that management had been completely replaced, and Zhang testified that many of his suppliers were confused and called him to see whether he was still with the company; this created great anxiety for him. Chinese employee Parker Gao testified that Zhang was generally treated worse that American Gem's Caucasian employees. (Pet. App. 4a); 339 F.3d at 1025.

---

[4] Bugbee, a Caucasian, lacked Zhang's qualifications. Bugbee had been to China only four times in his career, and did not speak Chinese. S.ER 28:17-24. Bugbee could not get as favorable terms from the Chinese vendors as Zhang. S.ER 162:12-163:3. Bugbee had significantly less education and less experience trading with Asia and China than Zhang. S.ER 181:1-19. The day after Zhang was fired, Bugbee assumed Zhang's former title, Vice President of Asian Procurement, and assumed his responsibilities including purchasing in China. Ex. 53, para. 2, ER 41; S.ER 162:12-14; 40:23-41:2; 26:7-16; 303:1-4. (Pet. App. 7a); 339 F.3d at 1026.

Mr. Zhang was publicly fired and humiliated. The newly appointed President and CFO personally went to the Boston Airport to fire Mr. Zhang loudly and publicly on February 24, 1999. President Parker refused to give Zhang a reason for firing him. CFO Hilger testified that he was instructed not to discuss anything. S.ER 264:23-266:6. (Pet. App. 5a); 339 F.3d at 1026.

Zhang was not allowed to resign. Bent on crushing Zhang's psyche, his benefits were immediately cancelled. His company car was immediately confiscated, and they held his personal effects, including family photos, and reference books for several weeks. S.ER 151:7-17. (Pet. App. 6a); 339 F.3d at 1026. He was denied any pay, which violated his employment contract.[5] He was denied severance pay. "Bugbee came to the company's Seattle office and confiscated the keys of American Gem employees Parker Gao and Stacy Li, who are Chinese." (Pet. App. 7a); 339 F.3d at 1026. Zhang was further denied the reasons for his termination for nearly two months.[6]

The very next day after firing him, all of Zhang's business contacts in the United States and abroad were immediately notified of his termination. President Parker and Zhang's replacement, Vice President Jim Bugbee, sent out two letters marked "urgent", one in English and the

---

[5] It is uncontested that the jury found that each Defendant breached Mr. Zhang's employment contract, which entitled him to pay through the end of his contract, a time period that extended well beyond his termination in February.

[6] S.ER 74:8-25; 75:4-13; Trial Exhibit 16, ER 44. The reasons for termination were proven false at trial.

other in Chinese to Zhang's vendors and business contacts. Ex. 53, ER 41. The letter contained false information. S.ER 62:1-22. The letter explained that Zhang's employment had been terminated. The letters poisoned Zhang's future in the industry, causing Zhang great embarrassment, hurting his reputation and future business. The Chinese translation made him look like a criminal. S.ER 156:22-157:1. (Pet. App. 6a); 339 F.3d at 1026.

Defendants had not terminated Caucasians with such passion or prejudice, even when they had proof of criminal conduct. For example, two white executives were allegedly stealing from the company, and another exposed himself to his coworkers. These Caucasian employees were not fired immediately or publicly, and were allowed to resign. Even with these serious and criminal allegations, the white executives received extended benefits, generous severance packages, an extension of pay, and use of a company car, one as long as six weeks after termination. (Pet. App. 6a-7a); 339 F.3d at 1026.

Defendants' reasons for firing Zhang were proven untrue at trial.[7] The jury heard additional evidence of

---

[7] The Appellate Court wrote: "In February 1999, Zhang took a trip to Iceland along with two former American Gem employees. They met with people at Atlantic Coast Fisheries, and Zhang handed out his Pacific Gem business card. Zhang told the company that he was taking a personal vacation with his father – his first vacation since starting work at SeaRich Seafoods – and used his vacation time for the trip. Upon his return from Iceland on February 24, 1999, he was met by Parker and Hilger as he exited Customs at Boston's Logan Airport, and they told him in a loud voice that he was terminated. When he asked why, they told him that he could go back to Seattle to find out. No one asked him why he had gone to Iceland. Cynthia Diaz, an attorney who worked for MCMI's parent company, told Zhang that he was fired for

(Continued on following page)

lying and mendacity by Defendants.[8]

## B. Zhang Suffered Significant Emotional Distress.

Zhang considered employment at American Gem to be a lifetime commitment, and his loyalty to the company was complete. S.ER 155:10-19. Throughout his employment (*see supra section A*), Zhang struggled with discrimination by his employer but had no avenue to complain; the company lacked any policies or complaint procedures regarding discrimination.[9]

---

going to Iceland with competitors. At trial, however, Lees testified that, at the time Zhang was terminated, no one knew why he had made the trip. Several months after he was terminated, and after repeatedly requesting an explanation, Zhang received a letter from Diaz stating that in addition to the Iceland trip, he was terminated because he violated a directive against extending credit, refused to provide documentation of transactions in China, and was insubordinate to Lees. None of these accusations was substantiated at trial."

[8] The misrepresentations the jury heard included the following: General Counsel Cynthia Diaz declared under oath that she had personal knowledge of the events surrounding the termination of Zhang. Diaz in court was forced to admit that she had no such personal knowledge, and her representation to the Court was false. S.ER 76:3-80:15. The Court (outside the jury's presence) found that Diaz had filed "a false affidavit in this court on a material issue of fact." S.ER 80a:8-35. Additionally, in support of a motion to dismiss on jurisdictional grounds, CEO Lees submitted a false affidavit swearing that he "only visited the State of Washington twice on business that did not involve Mr. Zhang." S.ER 114:9-118:4; Ex. 23, numbered paragraph 4, S.ER 322. Lees later admitted in open court that this declaration was false. S.ER 117:4-10; S.ER 119:19-120:25.

[9] Defendants failed to provide Zhang with "any antidiscrimination policy literature or training while he worked at American Gem and was not informed about how to make a discrimination complaint." Pet. App. 11a); 339 F.3d at 1028.

Zhang was further humiliated by his public termination at Logan Airport. S.ER 107:24-108:17. As Mullin witnessed and testified: "I came out, and I saw Wei first. [H]is eyes were as big as half dollars, and he was in shock." . . . He was very . . . distraught. He was upset. He was in shock. He was confused. . . . he didn't understand what happened." S.ER 101:2-23.

Defendants magnified Zhang's public humiliation by further shaming him publicly to all of his business contacts and vendors. Only one day after Zhang was publicly terminated at the airport, Vice President Parker and his replacement, Jim Bugbee, sent an "urgent" letter informing all of Zhang's contacts that he had been terminated from employment. Ex. 53, ER 41. The letter contained false information. S.ER 62:1-22. The letter was sent in an English language version as well as in a Chinese "translation." S.ER 164:2-24. The Chinese translation made Zhang appear to be "either criminal or something very bad." (Pet. App. 38a) 339 F.3d 1040. S.ER 156:10-158:21.

Zhang testified that the letter sent by the company to his Chinese suppliers, particularly those in his hometown, informing them of his termination, humiliated him. He further testified that his reputation and credibility were considerably damaged, and the letter severely and negatively affected his ability to do business with China in the future. S.ER 156:10-158:21.

He also struggled emotionally with having to explain to potential employers, and his parents, that he had been fired; he was unable to find an equivalent job. S.ER 196:18-198:11. Zhang felt a deep sense of guilt because the Chinese employees in Dalian lost their jobs as a consequence of his firing. He also suffered from nightmares. He

still struggles to forget the "nightmare." "It really hurt my heart," Zhang testified and stated that even today, "it's gut-wrenching torture." S.ER 214:6-25.[10]

## PROCEEDINGS IN THE DISTRICT COURT

This case was tried before the Honorable Judge Thomas Zilly in the Western District of Washington. Defendants made a motion for a judgment as a matter of law ("JMOL") after Plaintiff rested but before the close of all the evidence. Supp. ER 223:19-224:8. In that motion, Defendants made absolutely no mention of emotional

[10] The trial judge was in the best position to review the record for emotional distress. The trial judge witnessed Zhang break down in tears while reading a document on the stand. Trial Transcript: 696:16-697:10, in pertinent part:

> Q (By Mr. Blankenship) I want to direct you to – have you turn the page to the second page. And if you could read the highlighted portion.
>
> A . . . Sometimes I was crying quietly at home, because we American Gem Group should be a very good company with good profit and reputation. Excuse me. I spent all my energy in building our reputation, and is it the lord decision that let us down?
>
> Q I have one more – you want to gather your composure. Mr. Zhang? You okay to go on?
>
> A Yes. –
>
> THE COURT: Just a moment. There is no question before you.
>
> Q (BY MR. BLANKENSHIP) Could you –
>
> THE COURT: Do you want a further portion read?
>
> MR. BLANKENSHIP: Yes.
>
> THE COURT: Why don't you read it.

distress damages, failing to make any challenge to the sufficiency of the evidence regarding emotional distress damages. S.ER 225:3-19. The Court denied Defendants' motion. S.ER 228:10-12. Defendants failed to move or renew its JMOL motion at the close of the evidence; renewing such a motion is a prerequisite for preserving a challenge to the sufficiency of the evidence after an adverse jury verdict.

When objecting to jury instructions, Defendants did not even suggest that the Court's jury instructions for emotional distress damages were objectionable. Defendants further failed to make any objection to the Court instructing the jury on punitive damages.[11]

On August 23, 2001, the jury returned a unanimous verdict for Plaintiff on federal discrimination claims against the corporate defendants awarding compensatory damages of $360,000. The jury awarded punitive damages of $2,600,000. The jury returned a verdict against all Defendants on breach of contract and willful withholding of wages, awarding $86,000 and $87,500 respectively. Lees was not found individually liable for discrimination.[12]

---

[11] S.ER 291:3-293:19; 276:1-302:8; 289:19-290:6; 290:10-291:2; ER 92-96.339 "[T]he record does not reflect that the corporate defendants objected to instructions allowing the jury to award punitive damages nor did they make any objection to the sufficiency of the evidence for a punitive damages award at the close of the evidence." (Pet. App. 40a); F.3d at 1041-1042.

[12] The verdicts merely required that the jury assign liability on those causes of action without any finding of fact. Thus, Lees was never "exonerated" as Defendants contend. The jury simply failed to hold him individually liable for discrimination; no other conclusions can be drawn from that general verdict without resorting to speculation.

Thereafter, Defendants brought a motion for JMOL and new trial, which was denied. ER 147-162; 163-164, Court's Order.

## PROCEEDINGS IN THE APPELLATE COURT

The appellate court found that appellants had waived any arguments regarding the sufficiency of the evidence because the issue was not raised before the close of all of the evidence, under Fed. R. Civ. P. 50(b). (Pet. App. 20a); 339 F.3d at 1034. The appellate court found that all of the compensatory and punitive damages awards were justified and agreed with the trial court. 339 F.3d at 1040-1014. The Court concluded that the jury's discrimination verdict against the corporate defendants was not inconsistent with not finding Lees personally liable for discrimination.[13]

## REASONS FOR DENYING THE WRIT

### I. Petitioners Did Not Adequately Present or Preserve in the Courts Below Their Challenge to the Constitutionality of the Punitive Damage Award

The first question presented rests on petitioners' objection that the court of appeals assertedly did not discuss in adequate detail petitioners' objection to the size of the punitive damage award. The court of appeals'

[13] (Pet. App. 20a); 339 F.3d at 1032, n.5. "The facts set out above include several lines of evidence apart from Lees's actions suggesting that Zhang was fired due to his race or national origin."

opinion, petitioners complain, was not sufficiently "detailed", "meaningful" or "exacting." (Pet. i, 10, 11).

The Ninth Circuit's evaluation of the constitutionality of the award amply meets the standards established by this Court's decisions. Although it is not necessary, the lack of more detailed judicial analysis is entirely the fault of petitioners' appellate counsel.[14] The discussion of this constitutional issue in petitioners' opening brief in the court of appeals is, at best, only five sentences. Almost all of the discussion in petitioners' reply brief in the court of appeals was an attempt to defend the paucity of argument in that opening brief; the argument in the reply brief is headed "Appellants Preserved Their Challenges to the . . . Punitive Damage Awards." The appellate court cannot be faulted for failing to discuss in detail constitutional arguments that petitioners simply did not make. We set forth in an appendix to this brief the full text of the inexplicably truncated argument presented to the court of appeals. *See* Appendices A, B.

The only specific contention advanced by petitioners in the court below was that their conduct was not the least reprehensible because they had not engaged in any intentional discrimination at all.[15] The court of appeals properly

---

[14] Defendants' trial lawyers, and the lawyers who wrote the appellate brief and reply, are different than the Defense lawyers before this Court in this petition.

[15] Opening Brief of Appellants, No. 00-35604, pp. 46-47 ("There was nothing reprehensible about Parker and Hilger's decision to terminate Zhang, in light of Zhang's conduct. The laws prohibiting discrimination do not require that an employer tolerate such conduct, nor offer those who are racial minorities greater protection where, as here, the employer has a good faith belief that an employee has acted disloyally

(Continued on following page)

rejected that argument because it was inconsistent with the jury's finding of intentional discrimination.

> [T]he appellants' argument seems to depend on the position that the corporate defendants did not in fact discriminate against Zhang. As noted above, however, we are bound by the jury's finding that the corporate defendants did discriminate on the basis of race or ethnicity.

(Pet. App. 44a); 339 F.3d at 1043 n.14.

In this Court, petitioners have expressly relinquished any challenge to the jury's finding of discrimination. "While Petitioners vigorously disagree, they realize they are bound by the ruling below that they did discriminate." ((Pet.) p. 4 n.2). Thus petitioners have now abandoned the only specific argument that they made in the court of appeals.

In their petition, the defendants, for the first time advance a host of specific arguments that were never presented to the court of appeals. For example, *BMW of North America v. Gore*, 517 U.S. 559, 576-79 (1996), sets forth five factors relevant to an assessment of the reprehensibility of conduct. The analysis is not new, as the list

---

and in breach of his fiduciary responsibilities."); Reply Brief of Appellants', No. 00-35604, pp. 22-23 ("Appellants rely solely on the first [*Cooper Industries*] factor, that is, the disproportionality of the amount of the award to the degree of reprehensibility of the defendants' conduct. . . . Appellants' constitutional challenge to the amount of punitive damages is a simple one: Setting aside the evidence that Zhang presented against Lees (in light of the jury's determination that Lees did not discriminate), the remaining evidence is that Parker and Hilger terminated Zhang's employment because of his lies about his trip to Iceland.")

is merely repeated in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513, 1521 (2003). Petitioners object that "[t]hese factors do not appear in the Ninth Circuit's opinion." (Pet. 11). But that assuredly is because those five factors also do not appear in petitioners' court of appeals briefs.

Petitioners object that the court of appeals did not "discuss" the comment in *Campbell*, based on this Court's earlier decision in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 199 (1991), that a ratio of four to one might be close to the line of constitutional infirmity. (Pet. 8). Petitioners' own briefs in the court below, however, did not discuss that argument either. Petitioners fault the court below for "*limiting* its proportionality analysis to the observation that single digit multipliers generally are constitutional." (Pet. i) (*emphasis added*). But in petitioners' court of appeals briefs the discussion of such proportionality ratios was not "limit[ed]"; it was completely nonexistent.

The Ninth Circuit does not hold, as petitioners suggest, that "no assessment of specific conduct is required in a case where the plaintiff establishes liability for racial discrimination." (Pet. 12). There is no such detailed assessment in the Ninth Circuit's discussion of punitive damages because petitioners' themselves chose merely to insist that no discrimination had ever occurred, rather than present any substantive analysis; petitioners simply did not advance any contention that the particular types of discriminatory actions asserted by the plaintiff were insufficient to support the size of the punitive award. The court below did describe elsewhere in its opinion the particularly noxious discriminatory acts in this case. (Pet. App. 38a); 339 F.3d at 1040. The Ninth Circuit cannot be

faulted for failing to reiterate that list of those discriminatory practices, because petitioners' constitutional argument rested solely on a denial that any discrimination had ever occurred. The appellate court's description of the extraordinarily reprehensible practices in this case is throughout the opinion. *See e.g.,* (Pet. App. 3a-7a, 38a). The appellate court cannot be faulted for failing to repeat the same specific facts when analyzing reprehensibility.

Under these circumstances, petitioners waived in the court below all of the arguments that they are making for the first time in this Court. Petitioners may indeed have a grievance with the attorneys who represented them in the court of appeals, but they assuredly have no legitimate grievance with the court of appeals itself.

## II. This Case Does Not Present A Certworthy Issue Regarding The Amount of the Punitive Damage Award

The petition advances only a fact-bound argument about whether the court below correctly applied this Court's constitutional standards regarding punitive damages.[16] The opinion below presents, petitioners urge, a

[16] The petitioners are essentially arguing for a bright numerical line to be drawn completely abrogating the providence of the court. (Pet. 13). The test is whether the ratio between compensatory and punitive damages is so extreme that it is a violation of a party's due process rights. Here, the appellate court underwent a detailed analysis of precedent finding "single-digit multipliers are more likely to comport with due process" contrasting the ratio in this case and others with the "extreme ratios in *BMW* or *State Farm*." (Pet. App. 45a, 46a). *State Farm* itself recognized that "there are no rigid benchmarks that a punitive damages award may not surpass." *State Farm Mut. Auto. Ins. Co. v. Campbell,* 123 S. Ct. 1513, 1524 (2003) (noting that the 4 to 1

(Continued on following page)

"facially accurate recitation but erroneous application of this Court's precedents." (Pet. 10; see *id.* (Ninth Circuit's opinion "mentioned" *Campbell's* standards.)). Petitioners do not suggest that the decision below raises any major new legal issue not resolved by this Court's past precedents; they urge only that the court of appeals erred in applying those established standards to the particular facts of this case.

This Court does not grant review to reconsider such fact-bound determinations by the lower courts. "A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. Rule 10.

The petition in this case stops short of even asserting that the court of appeals necessarily arrived at the wrong result when it affirmed the punitive damage award. Rather, petitioners fault the court below largely for having failed to discuss in more detail constitutional arguments which petitioners themselves failed to advance in that court. That is not an appropriate basis for criticizing the court below, and it assuredly provides no basis for granting a writ of certiorari.

---

ratio was well within the "single digit" ratio discussed by the Court). *See Matthias v. Accor Econ. Lodging, Inc.*, 2003 U.S. App. LEXIS 21299 (7th Cir. 2003) (holding that State Farm did not establish a bright line rule, and affirming punitive damages in a ratio of 37.2 to 1).

## III. Petitioners Did Not Adequately Preserve In The District Court Any Objection To The Sufficiency of the Evidence Regarding Compensatory Damages

As the court of appeals correctly noted, petitioners waived in the district court any argument that the jury verdict was not supported by substantial evidence. (Pet. App. 20a); 339 F.3d at 1033. Rule 50(b) provides that a trial court can consider a post-verdict motion for judgment as a matter of law only if the moving party first filed such a motion "at the close of all evidence." Fed. R. Civ. P. 50(b). In the instant case, although petitioners filed a motion for judgment as a matter of law after the close of the plaintiff's evidence[17], they inexcusably failed to file such a motion "at the close of all evidence" as required by the Federal Rules of Civil Procedure. The petition does not challenge the decision of the court of appeals that any arguments about the sufficiency of the evidence were thus waived.

Petitioners also failed to preserve the issue when they chose not to object to the relevant jury instruction, as they should have under Rule 51. The instruction regarding emotional distress permitted the jury to make an award for such injuries without any requirement that any particular type of evidence be present. That instruction stated in pertinent part:

---

[17] Even that motion advanced no argument whatever regarding the sufficiency of the evidence of emotional distress.

> If you find for the plaintiff . . . your verdict may include the following items of damage if caused by a defendant. . . .
>
> Three. The emotional harm to the plaintiff caused by the defendants, including emotional distress, loss of enjoyment of life, humiliation, personal indignity, embarrassment, fear, anxiety and/or anguish experienced in such emotional harm that with reasonable probability will be experienced in the future by the plaintiff. . . .
>
> Your award must be based upon evidence, not upon speculation, guess or conjecture.
>
> *The law has not furnished us with any fixed standard by which to measure pain and suffering. With respect to these matters, you must be governed by your own judgment, by the evidence in the case and by these instructions.*

(Tr. 1294-96) (Emphasis added). "No party may assign as error the giving . . . [of] an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Rule 51, Fed. R. Civ. P.

Because of these waivers, any objection to the jury's award of compensatory damages was limited to petitioners' motion for a new trial. The district court denied that motion. A trial judge's denial of a new trial motion can only be overturned on appeal for a clear abuse of discretion.[18]

---

[18] A vast majority of the circuits uniformly hold that the denial of motion for a new trial under Fed. R. Civ. P. 59(a) is reviewed with great deference to the district court's ruling and will not be reversed in the

(Continued on following page)

The court of appeals properly concluded that the trial court's denial of the new trial motion in this case was not an abuse of discretion. (Pet. App. 39a); 339 F.3d at 1040. The certiorari petition does not contend that the court of appeals erred in affirming that exercise of discretion.

Under these circumstances it is difficult to see how petitioners can raise in this Court any argument regarding the type of evidence required to support a compensatory award for emotional distress. Petitioners are barred by Rule 50(b) from arguing that the evidence relied on by Zhang was insufficient as a matter of law to support that monetary award. Petitioners are barred by Rule 51 from arguing that the trial court erred in giving an instruction which lacked any such special evidentiary requirement. And petitioners do not argue that the denial of their new trial motion was an abuse of discretion.

## IV. This Case Does Present Any Inter-Circuit Conflict Regarding The Type of Evidence Needed to Support An Award of Damages for Emotional Distress

The circuit split of which petitioners complain is more semantic than real.

---

absence of a clear abuse of discretion. *Belk v. City of Eldon*, 228 F.3d 872, 878 (8th Cir. 2000); *EEOC v. Bd. of Regents of the Univ. of Wis. Sys.*, 288 F.3d 296, 304 (7th Cir. 2002); *Whitehead v. Food Max, Inc.*, 163 F.3d 265, 270 (5th Cir. 1998); *Ahern v. Scholz*, 85 F.3d 774, 780 (1st Cir. 1996); *Bristol Steel & Iron Works v. Bethlehem Steel Corp.*, 41 F.3d 182, 186 (4th Cir. 1994); *United States v. Draper*, 762 F.2d 81 (10th Cir. 1985); *Wolff v. Allstate Life Ins. Co.*, 985 F.2d 1524, 1528 (11th Cir. 1993); *Hygh v. Jacobs*, 961 F.2d 359, 365 (2nd Cir. 1992).

Petitioners note, first, that several circuits hold that an award of damages for emotional distress cannot be based solely on conclusory testimony. (Pet. 16-17). There is an inter-circuit conflict, petitioners contend, because "only the Eleventh Circuit joins the Ninth in ruling that a plaintiff's conclusory testimony by itself is sufficient to support emotional distress damages." (Pet. 17). But the decision in this case contains no such holding that conclusory evidence is sufficient; petitioners point to no passage in the opinion, which they assert, contains any such rule.[19]

Petitioners do not even assert that the evidence in this case consisted only of conclusory testimony by the plaintiff. Petitioners attack as insufficient "Zhang's testimony that he was 'greatly hurt and humiliated by his termination and the manner in which it was carried out.' . . . (App. 38a)." (Pet. 16). This passage might lead the reader to believe that the sole testimony offered by Zhang was the sixteen words in the interior quote. In fact, however, that is not a quotation of Zhang's testimony at all; it is a quotation from the court of appeals' summary of what the

---

[19] Nor is there any such approval of conclusory testimony in the Eleventh Circuit decision noted by petitioners. *Bogle v. McClure*, 332 F.3d 1347 (11th Cir. 2003), *certiorari dismissed*, 2004 WL ___. In that case the plaintiff

> Librarians testified the race-based transfers effectively destroyed their careers, and some testified the transfers caused them to resign or go on worker's compensation. When describing their emotional harm, the Librarians testified the transfers "upset," "embarrassed," "Humiliated," and "ashamed" them. Some Librarians testified the transfer caused them to become depressed and one even became suicidal.

332 F.3d at 1358-59.

jury might reasonably have concluded from the evidence. Zhang himself offered detailed testimony about the origin and nature of the emotional distress caused by the proven discrimination.[20]

Petitioners appear to assert, in the alternative, that there is an inter-circuit conflict because the court of appeals upheld the emotional distress award even though Zhang offered neither "expert testimony nor any testimony from a health professional substantiating the extent of his emotional harm or attesting to its cause." (Pet. 6). The Ninth and Eleventh circuits are unique, petitioners imply, in permitting such awards to plaintiffs where there is "no evidence of emotional distress other than their own testimony." (Pet. 17). But petitioners do not identify any circuit that requires that a plaintiff must offer as well testimony from an expert or mental health professional. Even the Fourth Circuit, which requires what it characterizes as "objective evidence", has held that "a plaintiff's testimony, standing alone, may support a claim of emotional distress." *Price v. City of Charlotte, North Carolina*, 93 F.3d 1241, 1251, 1254-57 (4th Cir. 1996).

The Fourth Circuit does use the phrase "demonstrable, genuine, and adequately explained" to describe the type of evidence needed to support an award of damages for emotional distress. *Price*, 93 F.3d at 1251. The Ninth Circuit does not utilize this formulation. (Pet. App. 37a); 339 F.3d 1040. But this distinction appears to be merely semantic. There is no indication that the distinction regarding utilization of that particular phrase betokens

---

[20] See *infra*, sections A and B.

any actual substantive difference in the type of evidence required in these two circuits.

## CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SCOTT BLANKENSHIP*
THE BLANKENSHIP LAW FIRM, P.S.
1201 Third Avenue, 28th Floor
Seattle, WA 98101
(206) 343-2700

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

*Counsel for Respondent*

**Counsel of Record*

## APPENDIX A

(Appellants' Opening Brief on Constitutionality of the Amount of Punitive Damages)
*Opening Brief p. 18;*
*Opening Brief pp. 46-47.*

"And the punitive damages award was grossly excessive in relation to any evidence in the record of reprehensible conduct on the part of the corporate defendants, and there for constitutes a 'grossly excessive' punishment in violation of the Due Process Clause." *Opening Brief p. 18.*

"The jury's award of punitive damages must be rational in order to avoid a violation of constitutional principles of substantive due process. *Cooper v. Leatherman Tool Group, Inc.* 532 U.S. 424. Specifically, *Cooper Industries* hold the Due Process Clause prohibits imposition of 'grossly excessive' punishments on tortfeasors, and, with particular significance here, the determination of excessiveness depends on the reprehensibility of a defendant's conduct. *Cooper Industries,* 532 U.S. at 434. There was nothing reprehensible about Parker and Hilger's decision to terminate Zhang, in light of Zhang's conduct. The laws prohibiting discrimination do not tolerate such conduct, nor offer those who are racial minorities greater protection where, as here, the employer has a good faith belief that an employee has acted disloyally and in breach of fiduciary responsibilities." *Opening Brief pp. 46-47.*

## APPENDIX B

(Appellants in Reply on Constitutionality of the Amount of Punitive Damages)
*Appellants Reply Brief, 21-23:*

"F. Appellants Preserved their Challenges to the Compensatory and Punitive Damage Awards.

Appellants' challenges to the sufficiency of the evidence to support the compensatory and punitive damages awards were preserved by Appellants' motion for JMOL, as discussed above. In addition, Appellants' constitutional challenge to the *amount* of the punitive damages award could not be raised until after the jury's verdict made known the amount of the award and the jury's rejection of the claim of discrimination against Lees. As such, Appellants' appropriately preserved that issue for appeal by raising it in for the first time in their post-trial motion.

. . .

The punitive damages award lacks a sufficient evidentiary basis for the same reasons that the discrimination verdict does: In light of the jury's ruling that Lees was not guilty of discrimination, there is no evidence in the record of intentional unlawful discrimination by any corporate representative. The punitive damages award should also be reversed because it is tainted by the trial court's erroneous exclusion of evidence of Appellants' anti-discrimination policy

. . .

Zhang claims that Appellants have waived their constitutional challenge to the *amount* of the punitive damages award by not having "sufficiently" briefing it. The authority Zhang cites, however, holds only that a *complete failure* to raise an argument in an opening appellate brief waives the issue. Appellants

> specifically challenged, in their opening brief, the proportionality of the punitive damages to the reprehensibility of Appellants' conduct, citing the standards set out in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 434 (2001). Appellants have appropriately raised the issue before this Court.
>
> Zhang also quibbles with Appellants' not having brief (sic) all three factors discussed in *Cooper Industries* (and its predecessor, *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996)) that may be considered in a challenge to the amount of punitive damages. There is no requirement, however, for Appellants to rely on all three factors. Appellants rely solely on the first factor, that is, the disproportionality of the amount of the award to the degree of reprehensibility of the defendants' conduct. The Supreme Court has described this factor as "[p]erhaps the most important indicium of the reasonableness of a punitive damages award. . . . " *BMW*, 517 U.S. at 575. And indeed, the *BMW* court held this factor warranted reducing a punitive damages award *before* the court went on to consider the other two factors. *Id.* at 580
>
> . . .

Appellants' constitutional challenge to the amount of punitive damages is a simple one: Setting aside the evidence that Zhang presented against Lees (in light of the jury's determination that Lees did not discriminate), the remaining evidence is that Parker and Hilger terminated Zhang's employment because of his lies about his trip to Iceland. On *de novo* review, as required by *Cooper Industries,* the punitive damages award of $2.6 million is simply not reasonable in relation to any alleged reprehensibility of this conduct, and must be reversed."

---